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EXPUNGING.

SPEECH of Mr BENTON,
OF MISSOURI,
In the U. States Senate, March 18, 1836.

[CONTINUED.]

The great position which I take is, that an impeachable offence has been charged upon the President, and that he has been adjudged guilty of that offence, without the forms of an impeachment, and without the benefits of a trial.

Suppose gentlemen undertake to arrest me at the threshold and say, we did not impugn his motives; we did not attribute bad intentions; we merely charged the fact.

To this I answer:

1. If there was no allegation, there was no denial of bad motive; and the charge of the crime implies the wicked intent:

2. That the speeches of gentlemen supplied what the form of their charge omitted; and that the imputation withheld from the record, was proclaimed from the mouth, and incorporated into every speech:

3. That the criminal averment, "*dangerous to the liberties of the people,*" was inserted in the first, and retained in the second form of the charge, and only dropped from the third and last form after having been repeatedly pointed out, and fully relied on as shewing the criminal and impeachable character of the accusation:

4. That no legislative use was made of the condemnatory resolve after it was passed, and that no such use could then, or can now be made of it; because, in its nature it is a ciminal accusation, and presents a case, not for legislation, but for punishment:

5. That gentlemen in the opposition drew the charge themselves, and altered it themselves; and may have had a reason, not yet explained, for omitting those imputations of criminality in the record which were so profusely and conspicuously used in their speeches:

6. That even a regular and formal impeachment requires no allegation of corrupt motive:

7. That the offence being stated in the article of impeachment, the conviction will be valid; and the only sentence known under our constitution will be pronounced without reference to the *quo animo*:

8. That this is not a case of regular impeachment, but of irregular condemnation without impeachment, and a charge on which the House of Representatives might frame an impeachment in form, and send it to us for trial. It is precisely the preliminary resolution, the general charge without specification and technical averments, which is the incipient step and opening process to the preferment of an impeachment.—So say the books. Listen to Jefferson in his Manuel of Parliamentary practice, drawn up by him for our special guidance, and printed by ourselves for our convenient and constant reference. He says: "*The general course is to pass a resolution containing a criminal charge against the supposed delinquent, and then to direct some members to impeach him by oral accusation at the bar of the House of Lords.*" This is the way to begin an impeachment in the House of Representatives, and this is the precise manner in which we began it in the Senate. We passed the resolution as the book directs, and we passed it with the criminal charge in it. We began the impeachment regularly, but we began it in the wrong place, and our proceedings ended where those of the House of Representatives begin; we ended with the adoption of a general resolution, containing a criminal charge against the supposed delinquent.

Those brief answers I hold to be sufficient, Mr. President, to set aside any defence which could be bottomed on the omission, accidental or designed, of formal averments of bad motives in the sentence pronounced against the President. They show that the impeachable nature of the charge is not affected by that omission; on the contrary, the very circumstance of the omission may aggravate the conduct of the Senate by showing an extension of the non committal policy to the high and sacred functions of Senators and judges, and exhibiting a subtle contrivance for condemning the victim without committing the judges. They show that this is not a case for common law averments,—not a case for setting out with legal verbosity, that the aforesaid Andrew Jackson, yeoman, not having the fear of God before his eyes; but being moved and seduced by the instigation of the devil, he first dismissed Mr. Duane from the Treasury; and after that, appointed Mr. Taney to the Treasury; and after that, he took upon himself the responsibility of removing the deposites; and, finally, he performed a certain late proceeding in relation to the public revenue. All this though eminently picturesque, and even quite dramatic, in a common law indictment, happens to have no place in an impeachment; and I might safely rest my case where it now stands; but I choose to go further, to rise higher. and to place my cause upon loftier and nobler ground. I take the true position that the impeachment of a magistrate differs from the indictment of a citizen; and that a magistrate may be impeached under our constitution, tried, convicted, and subjected to every penalty known to an impeachment, not only without the allegation of bad motives, but without the fact of such intentions, or even the possibility of possessing intentions of any kind, either good or bad. And first, I show what the judgment on impeachment is; and for that purpose refer to article 1, section 3, of the constitution.

"*Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States: but the party convicted shall nevertheless be liable to indictment, trial judgment and punishment, according to law.*"

Upon this provision in the constitution, I have to remark, that impeachment lies against nobody but an officer, and in its judgment is official, and not personal. It affects the officer not the man. The object of the judgment is preventive, not penal justice. It is not punishment for past offences, but prevention of future misconduct, that is intended. Removal from office, and disqualification to hold office, is the ultimate penalty which can be inflicted under it. If the offence for which the impeachment was made, should amount to a crime at common law, or by statute, then a criminal trial might ensue, and the punishment provided by law for that offence, might be inflicted. The difference between indictment and impeachment lies in the difference between preventive and penal justice. The impeachment is to prevent the officer from doing further mischief, the indictment is to punish the man for the mischief he has done. A man can only be punished for crime, and wicked intention is necessary to constitute crime; but the officer may be deprived of his office for acts not amounting to crime for want of the corrupt intention; for these acts may be detrimental to the community, and the welfare of the community may require that these acts should cease, whether they proceed from a wicked heart or a weak head, or even a mistaken principle of action. Hence, impeachment lies for the act, without regard to the criminal intention; and indictment lies for the crime, of which criminal intention is the essence and touchstone From this fair analysis of the impeachment process and judgment, in contradistinction to indictment, results the inference that criminality of intention is no way essential to the validity of impeachments under the constitution. So distinct is the trial by impeachment from that upon indictment for the same offence, that one cannot be plead in bar of the other under the clause of the constitution which protects the citizen from two prosecutions for the same offence

In England, on the contrary, the sentence on conviction under impeachment, extends to legal and actual punishment—to punishment in person and in property—for the party may be both fined and imprisoned. On indictments both in England and our America, as every body knows, the direct object of the prosecution is punishment—punishment in life, limb, persons, or property; and preventive justice is only an incident. Whenever, then, punishment would follow conviction, whether on indictment or impeachment—whenever the life or limb of the party was to be touched—whenever his body might be cast into prison, or his property taken by fine or forfeiture—in every such case, the *quo animo*, the state of mind, the criminal intent, was of the essence of the offence, and must be duly averred and fully proved, or clearly inferable from the nature of the act done; but in the case of impeachment under the constitution of the United States, where the sentence could extend no further than merely to prevent the party from using his power to do further mischief, leaving him subject to a future indictment, then the intent of the party, whether good or bad, innocent or wicked, became wholly immaterial, not necessary to be alleged nor requiring to be proved or inferred, if the allegation should chance to be made. Every averment relative to the intention would be surplusage; for the mischief to the public was the same, whether a public functionary should violate the law from weakness or wickedness, from folly or from design.

Mr. B. said that the cases of the judges, Chase and Pickering, were evidences of the truth of his argument; for in one of these there could be no corrupt or wicked intention, for the party was insane, and therefore incapable, both in law and in fact, of being either corrupt or wicked; and in the other of which, the mere naked violation of law was charged, without the slightest reference to the intentions, or *quo animo* of the party. Mr. B then went into a detailed statement of the impeachment of those two judges, to sustain the view he had been taking, and to apply historical facts and judicial decisions to the legal doctrines which he had laid down. Judge Pickering, a district judge of the United States for the state of New Hampshire, was impeached for acts of flagrant illegality, and which, in truth implied great wickedness, the articles of impeachment charged wicked and corrupt intentions; yet it was proved that he was incapable in law, and in fact, of wickedness or corruption, for he was utterly insane, both at the time of committing the acts, and at the time he was tried for them and could not, and did not appear before the senate to make any defence. His unfortunate condition was both proved and admitted, and the senate was moved by counsel to stop the proceedings against him, and to remit or postpone the trial; but the senate took the clear distinction between a proceeding which could only go to removal from office, and a disqualification for holding office, and a prosecution which might involve a criminal punishment; and they proceeded with the trial, heard the evidence, found the illegal acts to have been committed, and pronounced the sentence which the good of the community required, and which the unfortunate Judge was a proper subject to receive; that of removal from office. They did not add a sentence of disqualification for holding future offices, for he might recover his understanding and again become a useful citizen. The senate limited itself to a sentence which the good of the community demanded, and which was applicable to misfortune and not to criminality, which was suited to the acts of the Judge, without regard to the absence of intentions.

The case of Judge Chase was a case of a different kind to prove the same point. It was a case of various articles; some with, some without, the averment of criminal intentions. Judge Chase was impeached upon eight articles; five of them charged corrupt and wicked intention; three charged no intentions at all, being wholly silent on the question of motives, and merely alleging the commission of the acts and the violation of the law. The three articles thus silent on the question of motives, were distinct and substantive charges in themselves; not variations of the same charges in other articles. but containing new and distinct charges; and, therefore, to stand or fall upon their own merits, without being helped out by a reference to the same charges in another form, in another part of the proceedings. They were the articles first, fourth and fifth. Mr. B. would state them particulary; for if the least doubt remained on the mind of any one after seeing the case of Judge Pickering, the tenor of these three articles in the impeachment of Judge Chase would entirely remove and dispel that doubt. The first of these articles, which is number one in the impeachment, relates to the trial of Fries at Philadelphia, and charges the Judge with three specific instances of misconduct in conducting that trial; and concluded them with the allegation, "*that they were dangerous to our liberties,*" and "*in violation of law and justice,*" but without the slightest reference to the *quo animo* of the judge, of the state of mind in which the acts were done. The article is wholly silent with respect to his intentions. The fourth article contains four specifications of misconduct, all charged to have occurred on the trial of Callender, in Richmond, Virginia, and alleged then to be "*subversive of justice,*" and "*disgraceful to the character of a judge,*" but they were wholly silent as to the intentions of the judge, and left the *quo animo* with which he did the acts entirely out of the record. The fifth article charged a specific and single violation of law, in ordering the arrest of Callender upon a *capias*, instead of directing him to be called in upon a *summons*, but without imputing any motive or intention whatever, good or bad, to the judge, for preferring the capias to the summons. The only averment is, "*that Callender was arrested and committed to close custody, contrary to law, in that case made and provided*" Such were the three articles which charged violations of law upon Judge Chase, without imputing criminal intentions or corrupt motives to him; and upon which the judge was as fully tried, and made as ample a defence both upon the law and the facts, as he did upon the five other articles which contained the ordinary averments of wicked and corrupt intentions. Neither the learned judge himself, nor any one of his numerous and eminent counsel, made the least distinction between the articles which charged, and the articles which did not charge, corrupt intentions. They went to trial upon the whole alike;—put in no demurrers, made no motions to quash, reserved no points, but defended the whole upon the law & the facts of each separate charge. This, sir, should exterminate doubt and silence cavil. It should put an end to all idea of getting out of the dilemma in which the senate is placed by entrenching themselves now behind the innocency of President Jackson's intentions.

Mr. B. continued. Thus far, Mr. President, I have argued this point upon principles of law and reason, supported by precedents drawn from our own history, and I trust, have fully established my first proposition, namely, that the offence charged upon President Jackson was an impeachable offence, and that as a high crime, though it would be sufficient for my argument, that it charged conduct amounting to misdemeanors only, and consequently, that the conduct of the senate in proceeding against him, without the forms of an impeachment, was illegal, irregular, and unconstitutional, and subversive of the fundamental principles of law and justice. But although my case may be made out, and my proposition established, yet my magazine of argument is not exhausted, and I shall have in reserve a most potential argument to be used in this case. It is the argument of authority, and is drawn from the legislative history of one of the states of this union—the state of Kentucky; and a brief introductory narrative may be necessary to develope its origin, and to elucidate its application.

It is a matter of history, Mr. President, that some forty years ago, a judge of the court of appeals in Kentucky, had the misfortune to a pensioner on the Spanish crown, and hold a secret correspondence with the Governors General of Louisiana, for the separation of the western from the Atlantic states. A legislative inquiry established these facts, and the unhappy judge avoided the stroke of justice by retiring from the judgment seat. The same inquiry implicated another judge in Kentucky, not of the state courts, but of the federal judiciary; and at a succeeding session of the General Assembly, a member of that body, Humphre. Marshall, Esq. introduced a resolution condemning the conduct of that federal judge, and recommending an inquiry to be instituted into it by the house of representives of the Congress of the United States. This proceeding was resisted by distinguished members of the Kentucky legislature; and another resolution was brought in, utterly reprobating the motion of Mr. Marshall, and severely condemning the attempt to procure from a legislative body the expression of an opinion upon the guilt or innocence of an officer who was subject to impeachment before the Senate of the U. States After several days discussion, says the historian, the following resolution was offered by Mr. Clay:

"Whereas the General Assembly did, at their last session, order transcripts of the evidence taken before the committee appointed to examine into the conduct of Benjamin Sebastian, to be transmitted to the President of the United States, and to the senators and representatives from the state in congress; and as the present assembly has entire confidence in the general administration, and in the congress of the United States, among whose duties is that of arraigning the public officers, or private citizen, who may have violated the constitution, or the laws of the Union; and whereas the legitimate objects which call for the attention of the legislature, are themselves sufficiently important to require the exercise of all their wisdom and time, without engaging in pursuit of others, thereby consuming the public treasure, and the time of the representatives of the people in investigating subjects not strictly within the sphere of their duty; and inasmuch as the expression of an opinion by the General Assembly upon the guilt or innocence of Harry Innis, Esq., in relation to certain charges made against him, would be a prejudication of his case—if in one way, would fix an indelible stigma upon the character of the Judge, without the forms of trial, or judicial proceeding, and if in the other, might embarrass and prevent a free and full investigation into those charges; wherefore,

"*Resolved by the General Assembly*, That it is improper in them to prescribe to Congress any course to be taken by that body, in relation to the said charges, or to indicate any opinion upon their truth or falsehood.

"*Resolved*. That the constitution and laws of the land, securing to each citizen, whether in or out of office, a fair and impartial trial, whether by impeachment or at common law, the exhibition of a legislative body, before the commencement of any prosecution, expressing an opinion upon the guilt or innocence of an implicated individual, would tend to subvert the fundamental principles of justice."

Mr. President, I seize with confidence, and appropriate without abatement to the present occasion, every word that is contained in this resolution, with the remark, that the severe reprobation which it expresses is many ten th usand times more applicable to the Senate of the United States for its conduct towards President Jackson, than to the Kentucky legislature, for its proposed conduct towards Judge Innis. In that case the Kentucky general assembly was not the tribunal for the trial of the federal judge in the event of his impeachment, and their prejudication of his case did not affect the bosom of his constitutional triers: in President Jackson's case his prejudges were his constitutional judges, and judges who would have a legal right to sit in judgment upon him, notwithstanding their moral disqualification for that duty by their prejudication of his case. In Judge Innis's case there was no great national event connected with his fate; no change in the ascendency of political parties to be effected; no political prophecies to be accomplished by the prophets themselves; no great monied power to be gratified; no barrier to be struck down from between the people and their eternal foe; no obstacle to be removed from before the onward march of a political and moneyed confederacy which was advancing to the conquest of the government, and only stopped in its course by the invincible courage and incorruptible integrity of one man. Judge Innis's case was different from all this. It affected no one but himself. It was individual and personal; his prejudgers were not his triers; and whatever wrong might be done him, his country at least was safe, and her free institutions might survive and flourish; yet even in this case of mitigated wrong, and contingent injustice, how keen was the scent that snuffed the approach of danger in the tainted breeze! How sharp was the eye that detected the lurking mischief in the remote contingency of a base possibility! How pointed, how cutting, how strong, and how just the rebuke that was lavished upon a legislative body for setting the example of pronouncing an opinion upon the guilt or innocence of an officer, subject to impeachment before the Senate of the U. States! Every word of it is a two-enged sword, cutting into the vitals of the Senate, and leaving that deadly wound, for which there is no healing in the art of surgery. To comment upon such a case is impossible; to amplify, is to weaken it; to repeat, is to destroy; yet at how many points must the minds of senators instinctly hark, catch up the cutting phrase, apply it to their own case, while the small, still voice of conscience whispers—ten thousand times more applicable to us than to them! Mark a few of these phrases. "The constitutional right of congress to arraign the public officer who may have violated the constitution;" "the waste of time and public money in pursuing subjects not within the sphere of their duty;" "the injustice of prejudging an impeachable officer;" "the stigma upon an innocent man, if unjustly condemned;" "the impediment to justice if the guilty should be absolved;" "the flagrant enormity of pronouncing a opinion upon impeachable charges without the forms of trial, or judicial proceeding;" "the total impropriety of even indicating an opinion upon the truth or falsehood of the accusation;" "the constitutional and legal security of each citizen to have a fair and impartial trial, both by impeachment, and at common law;" "the subversion of the fundamental principles of justice, and the dangerous example of a legislative body, before the commencement of any prosecution, expressing an opinion upon the guilt or innocence of an implicated individual."

All these expressions apply directly, and with infinitely more force, to the case of President Jackson, than to that of Judge Innis. The Bank of the United States, through all its organs, had appeared as the accuser of President Jackson It had sat in judgment upon him for a violation of the laws and the constitution, in dismissing Mr. Duane, and appointing Mr. Taney, for taking upon himself the responsibility of removing the deposits, and for his proceedings in relation to the revenue. It had demanded his impeachment, foretold it, and named the member of the house of representatives whom it presumed to say, would bring it forward. The public press in the service of the bank had been for many months preparing the public mind for the event; and just at the commencement of the session, the bank itself, in its own person, and in the most imposing form, stepped from behind the curtain and appeared upon the stage as the responsible accuser. It caused a manifesto of some fifty pages to be drawn up by a committee of its directors, adopted by a vote of the board, ordered 5000 copies to be printed, a copy to be laid on the table of every member of congress, and the rest distributed all over the Union. It was that famous manifesto from which I have read some passages, in which the President of the United States was compared to counterfeiters, and the first place in the comparison assigned to him The senate and the country would remember that manifesto. It was the authentic act of the bank, and contained the identical charge against the President which was immediately afterwards brought into the senate, and what is more, it contained every argument which was used in the senate in support of the condemnatory resolution. The President, then, was an implicated and accused individual, at the commencement of the session 1833 '34. He was accused by the Bank: and being thus accused, the senate took cognizance of the charge without the intervention of the house of representatives, debated it for an hundred days, and adopted it The resolutions brought into the General Assembly of Kentucky, in the case of Mr. Innis strong as they are, are yet described by the historian from whom I have read them, as being "*temperate and just, and respectful to the sacred rights of every private citizen to enjoy an impartial trial without the denunciation of influential men in office.*" I concur in this sentiment, Mr. President, and so did the General Assembly of Kentucky concur with the mover of the resolution which I have read; for although that resolution was not adopted, yet it had the effect of changing the resolutions of Mr Marshall, and to deprive them entirely of their criminating character.

Such were the sentiments entertained in Kentucky, such the jealous and sensitive delicacy of the feeling against the prejudication of an impeachable officer: and all this generous feeling, watchful jealousy, and cutting rebuke, was called forth in a case of most remote and contingent mischief, where the prejudgers were not the triers, and where the prejudication could have but a most indirect operation upon the minds of the actual judges. If just there and then, how much more so now and here! When the Senate of the United States, upon charges put forth by the Bank of the United States, sits in judgment upon the President of the United States, condemns him unheard, fixes a stigma on his name, rouses 120,000 people to petition against him—more than ever appeared at the bar of the national convention against Louis the XVI—gives an audacious institution a triumph over him, and subjects his life to imminent deadly peril. Yes, sir, puts life itself in danger; for it is incontestable that the denunciations of the Senate had the effect of putting the pistol in the hands of the assassin. Yes, sir, these denunciations! for while rational, intelligent and informed people saw the injustice of the charge against the President, and the folly of believing that the removal of the deposites had made the distress, yet with the ignorant, the uninformed, and the insane, it was quite different. They believed it all, and acted according to their belief.—The ignorant went to the polls, to put an end, by their votes, to the administration of the "*tyrant*" that was destroying their country; the "*insane*" went to the portico of the capital to put an end, with his pistol, to the life of the same "*tyrant*" But thanks to God, and to the people! *His Providence* held back the bullets; *their confidence* sustained him at the polls, and *their justice* will find the means of expunging from our journal that unjustifiable sentence which should never have been put upon it!

Sooner or later, expunged it will be. At this session, if the voice of the people is obeyed; after the next general election, if it is not done now. There was no room